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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 99-217
	)	
Promotion of Competitive Networks	)	CC Docket No. 96-98
In Local Telecommunications Markets	)	
	)	CC Docket No. 88-57
	)	
	)	

TO: The Commission

COMMENTS OF
COMMUNITY ASSOCIATIONS INSTITUTE

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February 21, 2001

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Director, Government and Public Affairs

The Community Associations Institute ("CAI") hereby replies to the comments of others in the captioned proceedings. In its Comments of January 22, 2001, CAI made the following principal arguments:

- Expansion of the non-discriminatory access requirements to residential housing will not foster competition and is not warranted.
- Extending the reach of the federal pole attachment statute, Section 224 of the Communications Act, would infringe community association rights by interfering with existing easements.
- Community associations should retain the discretion to enter into exclusive contracts with competitive service providers.

CAI's Comments also summarized (6-7) the results of a survey sent to more than 8600 of its members and included as an appendix. The survey showed that (1) far from opposing competitive telecommunications entry, community associations must struggle to attract providers for their residents; (2) only one per cent of the respondents reported charging fees for entry; and (3) only six per cent of the respondents said they had denied access to a telecommunications provider. Typical reasons for refusing access were listed at page 6 of CAI's Comments.

<u>Access to resident-governed communities</u>
<u>is not a problem requiring further regulation.</u>

Not many commenters identified serious problems of general residential access. Most attention was focused on exclusivity and marketing preferences, discussed below. Apart from passing approval of certain state building access statutes which cover residential communities, the record thus far supports the findings of the CAI survey that competitive entry is being worked out through voluntary negotiation.[1]

Whether organized as condominium associations, homeowner groups, cooperatives or planned communities, CAI's members govern themselves in a manner guided by the prevailing interests of the community as a whole. Congress has recognized this self-governing concern for the common good by exempting cooperatively-organized utilities from regulation under one of the statutes at issue in this proceeding, Section 224 at subsection (a)(1). In a report accompanying the original federal legislation, Congress acknowledged that "cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests," and added that poor television service in rural areas gave cooperative utility customers (also shareholders) "an added incentive to foster the growth of cable television in their areas."[2]

States have created similar exemptions. The Massachusetts Department of Telecommunications and Energy ("MDTE") exempts condominiums and homeowners' associations from its definition of "utilities" subject to building access rules.[3] The Nebraska Public Service Commission ("NPSC") has stated that "since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements should not apply to this type of entity."[4]

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[1] That so few states have adopted such access laws is compelling evidence that federal intervention is not required. For its part, CAI would prefer to deal with legislation in states where residential competitive access is thought to be a problem -- closer to home, so to speak -- rather than at the federal level.

[2] S.Rep. 95-580. 95th Cong., 1st Sess., 18.

[3] 220 CMR Section 45.02. The MDTE explained the exemption as recognizing that "these organizations are operated through a decision-making process whereby each owner has a vote in business dealings." DTE 98-36-A, July 2000.

[4] Order Establishing Statewide Policy for MDU Access, Application No. C-1878/PI-23, March 2, 1999.

For analogous reasons, the FCC should stay its regulatory hand here. Beyond the decisionmaking process that must take into account the needs of each community resident, CAI members frequently find themselves having to "struggle to attract" (CAI Comments, 7) competitive providers for their constituents. Like the utility cooperative customers, these residents have an incentive to foster the growth of competition.

CAI repeats its earlier warning that the FCC has no legal authority "to impose requirements that result in the 'regulation' of community associations and owners." (Comments, 5) Even if there were a modicum of such authority that could be applied indirectly, say through the regulation of incumbent local exchange carriers ("ILECs"), FCC rules could not pass judicial muster if they address a non-existent or trivial problem.[5] Competitive telecommunications access to self-governing residential communities, CAI submits, on this record is not a federal problem. There is no need for general FCC regulation.

<u>Requiring access through private utility rights-of-way does not avoid improper regulation of community owners.</u>

As CAI commented in the opening round January 22, 2001, "[u]nless the consent of the community association or owner is also required,

> The [utility access] requirement effects an expansion of the ILEC's or utility's easement rights without the consent of the owners, without compensation to the owners and without a corresponding benefit to the owners.

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[5] *Home Box Office v. Federal Communications Commission,* 567 F.2d 9, 36 (1977) ["Regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal citation omitted)]

This is a violation of established law that "the scope of an easement cannot be modified without the consent of the owner of the property subject to the easement." (Comments, 3) Without just compensation, the modification represents an unconstitutional taking of the owner's property. (Comments, 4)

CAI agrees with the several ILECs (Southwestern Bell, Verizon) and power companies who argue for strict limitation of any existing utility rights-of-way in MTEs to the actual space occupied by utilities. But if that occupancy does not exactly track what a competitor needs to reach its customer, the competitor will have exceeded the bounds of the right-of-way and intruded impermissibly on the owner's property. *Id.*

Suppose a competitive carrier wants to extend lines from the utility right-of-way to each unit. If a unit owner does not grant permission to enter the unit, that should be the end. Unlike an apartment setting, the community manager may not be authorized to grant access against the owner's wishes.

The problem is particularly acute in campus-like settings such as those for planned communities. CAI members in this classification face many of the same safety and security concerns raised by the Education Parties in opening comments.

A different problem arises if the ILEC or other incumbent utility's right-of-way privileges are not clearly specified. Regrettably, the Commission's expansive interpretation of Section 224, if not narrowed physically by a defined right-of-way, could allow competing providers to assert that they are entitled to install lines anywhere on a property simply because an incumbent utility's scope of permission is not well-defined. This is not acceptable inside an MTE building, much less in a campus setting of multiple residences. CAI also believes it does not conform with the law.

<u>Exclusive contracts for residential access may be pro-competitive and should not be banned.</u>

CAI doubts the efficacy of the ban on commercial exclusives and opposes its extension to residential environments:

> Our members have had direct experience over the past several years in trying to obtain competitive telecommunications services for their communities. The problem was not that exclusive contracts kept out providers, but rather that without an exclusive contract the provider would not risk the infrastructure investment to provide services.

(Comments, 3) For the reasons discussed above concerning CAI members' residential self-governance, the discretion to enter into exclusive contracts should be preserved.

The record thus far is mixed. Several competitive carriers and the Real Access Alliance support the continued allowance of residential exclusives. Even many of those who support extending the commercial ban on exclusives to residential property agree that the change should be forward-looking and not apply to existing agreements.

It is important to remember that residential communities do not have the "fall-back" of preferential marketing agreements which most commenters support as an acceptable replacement for exclusive access in commercial settings. It would be rare for a residential property to possess the same economic potential that supports marketing preferences in office environments.

CONCLUSION

For the reasons discussed above, the Commission should not extend mandatory access requirements to self-governing residential communities such as those represented by CAI. The

FCC should abandon its interpretation of rights-of-way under Section 224 as permitting access, indirectly or directly, to residential property without an owner's consent. Exclusive access agreements may represent a residential community's only means of attracting competitive telecommunications service, and should not be prohibited.

Respectfully submitted,

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